LEE YEE YEW

v.

UNITED ORIENTAL ASSURANCE SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KOTA BHARU
IDRIS YUSOFF J
[CIVIL APPEAL NO: 12-77-1995]
8 FEBRUARY 1998

INSURANCE: *Accident insurance - Claims - Whether deceased's act came within exemption clause - Whether action of deceased was an unlawful act - Whether it was contrary to Immigration Act 1959/63, s. 5(1) - Whether act of deceased could come within exception of Immigration Act 1959/63, s. 5(1)*

INSURANCE: *Accident insurance - Claims - Whether refusal to pay claims unjustly affects innocent 3rd party*

Both actions herein were filed separately against the same defendant but were consolidated as they bear some common questions of law and fact. The deceased was insured under two insurance policies; a personal policy, of which the plaintiff in the first action was the administrator of the estate of the deceased, and a group insurance policy which was taken out by the deceased's employer, the plaintiff in the second suit. Both policies contained an exclusion clause which did not cover death suffered by the insured while committing or attempting to commit an unlawful act.

The facts showed that the deceased had gone to Golok, Thailand *via* an unauthorised route. On the return journey *via* the same unapproved point of entry, the sampan that the deceased was on capsized while crossing the Golok river and the deceased perished in the river. The defendants relied on the exclusion clause in resisting the claims herein and contended that the act of the deceased in crossing the river was tantamount to committing an unlawful act contrary to s. 5(1) of the Immigration Act 1959/63 ('the Act'). The plaintiffs submitted that the incident came within the exemption of s. 5(1) of the Act, for the deceased was required to be home as his father was ill and the authorised route being closed, it was thus lawful for the deceased to cross the river to re-enter Malaysia through the unauthorised point of entry. The lower court had dismissed both the actions and the plaintiffs appealed. The issues raised by the plaintiffs were: (i) whether the act of the deceased came within the exclusion clause of the policies; (ii) whether the incident could come within the exception of s. 5(1) of the Act; and (iii) whether refusal to pay the policy money unjustly affected the beneficiary of the estate and the right of the innocent third party.

Held:

[1] The exclusion clause stated that the insurance policies did not cover death or disablement while committing or attempting to commit an unlawful act. Unlawful act was defined to mean any act forbidden by law. Thus the deceased in crossing the Golok river, an unauthorised route and point of entry, had infringed s. 5(1) of the Act.

[2] The onus of establishing the existence of other reasonable cause in s. 5(1) of the Act, is on the party who asserts it. The expression other reasonable cause means taking in every cause which in a given situation appears to be reasonable to a court justifying departure of the law. The deceased had committed an offence under the Act and the exception to s. 5(1) of the Act could not be invoked to make it lawful. There did not exist any other reasonable cause as envisaged in s. 5(1) to enable the deceased to re-enter Malaysia through an unauthorised point of entry. Although it had become a normal practice for people going to and coming back from Golok by river and no action had been taken by the authorities, it did not legalise an otherwise illegal act.

[3] Considering the facts in the instant case, the 3rd party could not avail himself of the benefits derived under the policies, if by the terms and conditions, the insurers could repudiate the liabilities.

[Appeals dismissed with costs.]

Cases referred to:
Beresford v. Royal Insurance Co Ltd [1938] 2 All ER 602 ***(refd)***
Cornish v. Accident Assurance Co Ltd [1889] vol xxiii 453 ***(refd)***
Hardy v. Motor Insurance Bureu [1964] 2 All ER 742 ***(refd)***
Tinsley v. Milligan [1993] 3 All ER 71 ***(refd)***

Legislation referred to:
Immigration Act 1959/63, s. 5(1)

For the plaintiffs - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co
For the defendants - Rasamani Kandiah; M/s Khoo & Sidhu

Reported by Michele Saw

JUDGMENT

Idris Yusoff J:

Two civil actions bearing registration nos. 52-517-92 and 52-578-92 were ordered to be consolidated as they appeared to bear some common questions of law and fact and the defendants in both cases were the same. The two actions were tried at the Sessions Court, Kota Bharu. For easy reference I term the plaintiff in 52-517-92 as the first plaintiff while the plaintiff in 52-578-92 as the second plaintiff.

From the notes of evidence the following facts have emerged and hardly in dispute. The first plaintiff is the administrator of the estate of his deceased son named Lee Teong Lee and is bringing this action for the benefit of the deceased's estate and also for the deceased's daughter Lee Hui Nee while the second plaintiff is the employer of the deceased.

The deceased during his life time took out a "Selective Benefits Personal Accident Policy" from the defendants (the insurers) effective from 24 April 1988 to 23 April 1989. The second plaintiff also took out from the same defendants a "Group Personal Accident Policy" effective from 17 June 1987 to 16 June 1988 and was renewed for a further 12 months from 17 June 1988 to 17 June 1989 – see pp. 70-80 of the appeal record. The two policies contain various fundamental terms and conditions which are almost similar to each other except for certain variations brought about to suit the circumstances. During the currency of both policies the defendants undertake in the event of death of the insured under the "Selective Benefits Personal Accident Policy" or of the life insured in respect of the other policy, and in both cases death occur in circumstances as specified in the policies, to pay the insured sum of RM50,000 to the deceased's legal personal representative or the second plaintiff, as the case may be, but such payments are expressed to be subject to the terms provisos and conditions contained in the policies or endorsed thereon.

On perusal of both policies they show that there exists certain "exclusion clause" in that the policies do not cover death or disablement which arises in circumstances as detailed therein. And one of the circumstances is that they do not cover death suffered by the insured or life insured while committing or attempting to commit any unlawful act.

The evidence further shows that on 1 August 1988 at about 7.30pm the deceased with two friends named Wong Yoke Seng (SP3) and Lim Kok Meng left for Golok *via* an unauthorised route. Whilst in Golok they had their food and drinks until the early hours of the following morning when all the three left for Kota Bharu also *via* the same unauthorised route ie, by crossing the

Golok river in a small motorised sampan. However, before they could reach the Malaysian side of the river, the sampan capsized and the deceased perished in the water while SP3 and Lim Kok Meng managed to swim to safety. The body of the deceased was recoverd on 8 August 1988. Sometime later, the defendants were informed of this tragic incident and claims for payment of insurance moneys under both policies were made to them, but were, however rejected. Consequently, the respective plaintiffs filed their claims in the Sessions Court and after a full hearing the Sessions Court Judge dismissed both claims with costs. Being dissatisfied with the said decisions the two plaintiffs now appeal.

It appears that the defendants in resisting the claims relied upon the "exclusion clause" as stated above. It was the contention of the defendants that the act of the deceased in crossing the river in such circumstances was tantamount to committing or attempting to commit an unlawful act ie, by re-entering or trying to re-enter Malaysia through unauthorised or unapproved point of entry, contrary to the Immigration Act 1963.

To my mind the words under the "exclusion clause" are clear and unambiguous and though I am not unmindful that such clause is to be construed against the insurers with utmost strictness, nevertheless those words, given their ordinary meanings manifest clear intentions of the parties and which intentions must be made to prevail. It is clearly stated under the "exclusion clause" that the policies do not cover death or disablement while committing or attempting to commit any unlawful act and that the expression "any unlawful act" seems to mean any act forbidden by law. Thus said, it is clear that the act of the deceased and his two friends in crossing the Golok river in the way they did was forbidden by law as it was contrary to s. 5(1) of the Immigration Act 1959/63. Be that as it may, the plaintiffs attempted to show the incident as coming within the exception to that section. Section 5(1) of the Immigration Act reads:

> (1) The Minister may, by notification in the Gazette, prescribe approved routes and declare such immigration control posts, landing places, airports or points of entry, as he may consider to be necessary for the purposes of this Act, to be immigration control posts, authorized landing places, authorized airports or authorized points of entry, as the case may be, **and no person shall, unless compelled by accident or other reasonable cause,** enter or leave Malaysia except at an authorized landing place, airport or point of entry. (emphasis added)
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence against this Act.

The plaintiffs claim that the court ought to conclude that the case fell well within the province of "other reasonable cause", thereby making it lawful for the trio especially the deceased to cross the river and re-enter Malaysia through unauthorised point of entry. This is due to the deceased being required to be back home as his father (SP1) was down with high fever and being 70 years of age, it was thought that the deceased being the eldest son and resided with the father ought to be nearby, and it so happened that at that hour the authorised route had been closed.

As submitted by counsel for the plaintiffs "each and everyone of us gets sick at one time or other. Unless the sickness is of such a scale, we do not call up relatives or friends. For the brother of the deceased to have called the eldest brother, the deceased to come back must have caused concern to the brother that the deceased would be with the father with whom he lives". Counsel went on to submit that "... the father of the deceased was 70 years old and at that age high fever (demam panas) is of great concern to the family ...".

The onus of establishing the existence of "other reasonable cause" is on the party which asserts it and from the assistance that has been derived from certain authorities, it seems to suggest that the expression means taking in every cause which in a given situation, appears to be reasonable to a court justifying departure of the law.

In evidence SP1 said the evening prior to the deceased's death he had a high fever but surprisingly despite his age and down with high fever neither he nor any other person had ever thought of summoning a doctor to attend to him and what is more surprising the evidence of SP2 (another son) seems to shed some dubieties on the veracity of SP1 evidence when SP2 claims that his father had a slight illness ie, he was just feeling slightly unwell. Such piece of evidence appears to me as an attempt by the witness to obiate creating an avenue for criticism from counsel for the defence for not summoning a doctor. Further, according to SP2 deceased had to be informed of the father's indisposition but it is appalling to note that when told of the deceased's disappearance in the river, the father and SP2 went to Rantau Panjang to help search for the body and the father managed to be at the scene for some period of time inspite of his illness. Indeed the act and conduct of the father looked somewhat odd and inconsistent with that of a person of advanced age and down with high fever!

Judging from the events that occurred, it appears to me that SP1 illness, if at all he was ill, hardly warranted any call for the deceased's urgent return, and in particular, bearing in mind that when the deceased left for Golok at about 7.30pm the same evening (only some hours earlier) no one had ever tried to dissuade him from going for reason of his father's illness.

The learned Session Court judge, in his judgment made a finding of fact that the deceased had committed an offence under the Immigration Act 1959/63 and the exception to s. 5(1) of the Act could not be invoked to make it lawful for the deceased's unlawful act. There did not exist any "other reasonable cause" as envisaged in s. 5(1) to enable the deceased to re-enter Malaysia through an illegal or unauthorised route. He had also considered the fact that although it had become a normal practice for people going and coming back from Golok by river and no action had been taken by the authorities, it, nevertheless, did not legalise an otherwise clearly an illegal act. The learned Sessions Court judge before coming to that findings had carefully studied the facts, had the advantage of hearing the witnesses and assessing their credibilities and had also considered the authorities quoted by counsel from both sides. For myself, I consider that such findings of fact are supported by evidence and authorities and should not be disturbed. I do not find any ground to suggest that the Sessions Court judge had erred in his evaluation of fact and application of the law.

The final point raised by counsel for the plaintiffs is the deprivation of the policy moneys allegedly due to the first plaintiff as administrator of the estate of the deceased assured under the Selective Benefits Personal Accident Policy and to the second plaintiff under the Group Personal Accident Policy.

It is contended that the refusal of the defendants to pay the policy moneys had greatly and unjustly affected the beneficiary of the estate of the deceased and the second plaintiff. Counsel goes on to say that according to the contract between the parties concerned the defendants had agreed on the death of the deceased to pay to the selected beneficiary ie, the deceased's 12 year old daughter and the second plaintiff a sum of RM50,000 each. Counsel further submits that even if the deceased had committed a criminal act that would not affect the right of innocent third parties from getting the moneys. A number of authorities are quoted to support his argument. They are amongst others:

(i) *Hardy v. Motor Insurance Bureu* [1964] 2 All ER 742. This case concerns a statutory requirement for taking out a policy of insurance against third party risks so that the third party can claim from the insurance company for the injuries sustained by him in the event of him being involved in a motor accident. The whole intention of the law is to protect the interest of the third party.

(ii) *Cornish v. Accident Assurance Co. Ltd.* [1889] Vol. xxiii 453. This case stresses the importance of bearing in mind the objects of the parties to the contract so that the contract must not be construed so as to defeat that object.

(iii) The few other cases quoted, seem to decide whether death was accidental or otherwise for the purpose of claims under the insurance policies.

With respect I do not consider these cases to be of assistance to the plaintiffs. The last case quoted by counsel was *Tinsley v. Milligan* [1993] 3 All ER 71 (H of L), a case which relates to the enforceability of a contract by the court particularly when it involves issue of public policy or public conscience test. In passing, I wish to mention that this issue was never raised by counsel for the defence either before me or in the court below but since counsel for the plaintiffs has pursued this line of argument before me, I feel I am not out of place to make some observations thereon. In his submissions, counsel quotes an excerpt from the judgment of Nicholls LJ in the Court of Appeal in *Tinsley* case – see [1992] 2 All ER 391 at p. 398.

> ... the court should keep in mind that the underlying principle is the so-called public conscience test. The court must weigh, or balance, the adverse consequences of granting relief against the adverse consequences of refusing relief. The ultimate decision calls for a value judgment ...

But down the same paragraph His Lordship went on to quote some observations by Lord Diplock in *Hardy's* case *(supra)* in which His Lordship associated himself with them -

> ... the rule is concerned not specifically with the lawfulness of contracts but generally with the enforcement of rights by the courts, whether or not such rights arise under contract. All that the rule means is that the courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting the right (or by someone who is regarded in law as his successor) which is regarded by the court as sufficiently antisocial to justify the court's refusing to enforce that right ...

On the facts, the Court of Appeal held that "far from it being an affront to the public conscience to grant relief in this case, it would be an affront to the public conscience not to do so". The said decision was moreover upheld by the House of Lords.

There is again the case of *Beresford v. Royal Insurance Co. Ltd.* [1938] 2 All ER 602, a decision also of the House of Lords, in which the court refused to enforce a contract of insurance. The facts in that case are that by a condition in an insurance policy issued in 1925, it was provided that: "if the life assured shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof." The premiums were regularly paid upon the policy until 1934, when the assured committed sucide.

It was found as a fact by the jury that the assured was sane at the time of his death. The Court of Appeal held that although the condition in the policy necessarily implied a positive undertaking by the company to pay if the assured died by his own hand, sane or insane, after the expiry of a year from the commencement of the insurance, it was contrary to public policy that either a person who had committed a crime or his personal representative should be allowed to benefit by that crime. In the circumstances, the contract was therefore unenforceable.

In that case it appears there was a conflict between two grounds of public policy. The first was the duty of the court to enforce contracts and the other that no man or his estate should be allowed to benefit by his own crime. In the court of first instance, the judge held that sancitity of contract was of paramount importance. But the Court of Appeal held that it was the over-riding duty and inherent power of the court to refuse its aid to enforce a promise where the plaintiff had to set up his own crime or the estate of the deceased sought to benefit from a crime of the deceased. The House of Lords upheld the decision of the Court of Appeal.

To my mind considering the facts in the instant appeal and the authorities quoted, even the third party cannot also avail himself of the benefits derived under the policies if by their terms and conditions, the insurance can repudiate the liabilities. Unless the policies otherwise provide or where a case of estoppel arises against the insurers the right of any person claiming through the deceased assured are no greater than the assured himself.

For reasons stated above I dismiss both appeals with costs. Since the appeals are dismissed, I do not think I should discuss the point raised by counsel for respondents pertaining to the *locus standi* of the first plaintiff upon the named beneficiary attaining the age of majority and should herself take over the conduct of the proceedings in the pursuit of her claim.